INDEX

662396—62——1

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 65

WEYERHAEUSER STEAMSHIP COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 55) and its supplemental opinion (R. 64) are reported, respectively, at 174 F. Supp. 663 and 178 F. Supp. 496. The opinion of the Court of Appeals for the Ninth Circuit (R. 148) is reported at 294 F. 2d 179.

JURISDICTION

The judgment of the court of appeals (R. 160) was entered on August 30, 1961. A timely petition for rehearing was denied on October 24, 1961 (R. 161). The petition for a writ of certiorari was filed on January 19, 1962, and was granted on March 5, 1962 (R. 161). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether Section 7(b) of the Federal Employees' Compensation Act, which states that the liability of the United States under the Act for injuries to its employees "shall be exclusive, and in place, of all other liability of the United States * * * to the employee * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such injury," precludes a suit by a third party to obtain contribution to the payment of damages on account of an injury to a federal employee covered by the Act.

STATUTES INVOLVED

The Federal Employees' Compensation Act (Act of September 7, 1916, 39 Stat. 742, as amended, 5 U.S.C. 751, *et seq.*) provides in pertinent part:

> Section 1(a) [5 U.S.C. 751(a)]—The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.
>
> * * * * *
>
> Section 7(b) [added by Section 201 of the Act of October 14, 1949, 63 Stat. 861, 5 U.S.C. 757(b)]—The liability of the United States or any of its instrumentalities under this Act

or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute * * *.

STATEMENT

In September 1955 the S.S. F.E. WEYERHAEUSER and the Army dredge PACIFIC collided off the Oregon Coast (R. 55). This action, which arises from the collision, was brought by the petitioner against the United States under the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781, *et seq.*, in the United States District Court for the Northern District of California. On cross-libels, the district court found that the collision occurred through the mutual fault of the two vessels (R. 63). The court accordingly held that each party was entitled to recover of the other one-half of its provable damages and court costs sustained as a result of the collision (*ibid.*). The parties thereafter entered into a stipulation concerning the damages each suffered. The only disputed item of damages involved the liability of the United States for one-half of the amount of a settlement entered into by petitioner and one Reynold E. Ostrom, a civil service employee of the United States

who had been serving aboard the PACIFIC, for personal injuries suffered in the collision.

Ostrom had received compensation under the Federal Employees' Compensation Act[1] (R. 72), and thereafter brought suit against petitioner to recover damages for his injuries (R. 73). After an unsuccessful attempt to implead the United States in that action (R. 41–46, 49–52), petitioner settled Ostrom's claim for $16,000, an amount stipulated to be reasonable (R. 68), and sought to include that amount in the apportionment of damages. The only issue before the district court on the question of damages was whether the United States must contribute to petitioner's settlement with Ostrom (R. 69). The district court found that the United States had $37,439.26 provable damages and petitioner had damages of $43,-652.13 (including the $16,000 paid to the government employee) (R. 71–75). The United States was ordered to contribute one-half the difference between the parties' provable damages, or a total of $3,106.44 (R. 74). The court thus held that the $16,000 paid to Ostrom in settlement of his claim against petitioner was an item of provable damage to which the United States must contribute in the overall apportionment of damages. A final decree was entered on June 20, 1960 (R. 76–78).

On the appeal of the United States to the Court of Appeals for the Ninth Circuit, that court reversed

---

[1] Ostrom reimbursed the United States for its compensation outlay after his settlement with petitioner (R. 73), as required by Section 26 of the Federal Employees Compensation Act, 5 U.S.C. 776, discussed *infra*, pp. 15–16, 18, 22–23, 29, 33.

and remanded with directions to recompute the damages after excluding the Ostrom settlement, holding that the exclusive-liability provision of the Federal Employees' Compensation Act precluded contribution by the United States on account of an injury to one of its employees.

SUMMARY OF ARGUMENT

I

Section 7(b) of the Federal Employees' Compensation Act provides that the liability of the United States to make compensation payments under the Act "with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States * * * to the employee * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such injury * * * under any Federal tort liability statute * * *." Petitioner brought this suit under the Public Vessels Act, 46 U.S.C. 781, *et seq.*, a Federal tort liability statute, seeking to impose upon the United States a tort liability "with respect to the injury or death of an employee" of the United States and attempting "to recover damages from the United States * * * on account of such injury * * *". Petitioner's claim is therefore foreclosed by the plain words of the statute.

II

Congress had two primary purposes when it passed the Federal Employees' Compensation Act in 1916: (1) to grant to federal employees a swift, economical, and sure right of compensation, regardless of

considerations of fault, for employment-connected injuries; and (2) as a *quid pro quo* for the United States as employer, to limit the types and amounts of recoverable damages for such injuries. These considerations are so central to the scheme of the Act that one cannot attach to the injured employee's retained right to sue third parties consequences which would abridge the statutory limitation upon the liability of the United States. This conclusion is confirmed by the reimbursement and subrogation provisions of the Act, which provide that the injured employee may not even retain the proceeds of a suit against a third party until he has reimbursed the United States for its compensation payments. *A fortiori*, the employee may not increase his recovery over the statutory amounts if the result is to impose upon the United States a liability in excess of its liability for compensation payments under the Act.

III

In situations where both the United States and a third party have negligently caused the injury of a federal employee, there are three possible ways in which one might define the rights and liabilities arising out of suits against third parties without impairing the statutory limitation upon the liability of the United States.

The first alternative—restriction of the employee's right to sue third parties—would be inconsistent with this Court's decisions holding that an injured party may recover his entire damages from either of two vessels, both of which were at fault.

The second alternative—to allow contribution on behalf of the third party but not in excess of the amount which the United States could be required to pay to its employee under the Compensation Act—is a compromise without support in the language of Section 7(b) and runs counter to the provisions of the statute which allow the United States to recoup its compensation payments out of the proceeds of a suit against third parties. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412.

Only the third alternative—denying the right of contribution from the United States to a third party at fault with respect to the injury of a federal employee covered by the Act—is at once consistent with the fundamental purposes of the Federal Employees' Compensation Act, with this Court's prior decisions, and with the language of the Act, including its reimbursement provisions. This third alternative should, therefore, be applied to a case such as this one in accordance with the plain mandate of the statutory language.

IV

The courts of appeals which have considered the language and purposes of the "exclusive liability" provision of the Federal Employees' Compensation Act or of the almost identical provision of the Longshoremen's and Harbor Workers' Act have unanimously sustained the immunity of the United States from efforts by third parties to obtain contribution.

The cases relied upon by petitioner (as it concedes) involve contractual claims to indemnity and not rights to contribution or indemnity in tort. Since it is also

conceded that there is no basis for a contractual claim in the instant situation, these cases are not in point. Also unavailing are the cases which sustain the liability of a cargo-carrying vessel for contribution to cargo damage, notwithstanding such a vessel's immunity from suit for negligence by its cargo under the Harter Act (46 U.S.C. 190, *et seq.*). The discrete language and purposes of the Harter Act are far removed from the scheme of the Federal Employees' Compensation Act.

ARGUMENT

I

THE EXPRESS TERMS OF SECTION 7(b) OF THE FEDERAL EMPLOYEES' COMPENSATION ACT PRECLUDE PETITIONER'S ATTEMPT TO OBTAIN CONTRIBUTION OR TORT RECOVERY FROM THE UNITED STATES

On its face, the language of Section 7(b) of the Federal Employees' Compensation Act (added by Section 201 of the Act of October 13, 1949, 63 Stat. 861, 5 U.S.C. 757(b)), limits the liability of the United States with respect to the injury or death of one of its employees to the compensation payable under the Federal Employees' Compensation Act. It explicitly provides:

> The liability of the United States * * * under this Act * * * with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States * * * to the employee * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such injury or death in any direct judicial proceedings in a civil action or in admiralty, or by proceedings

> whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute * * *.

It is difficult to see how Congress could have stated more clearly that the only liability for the injury or death of an employee to which the United States shall be subjected is its liability to furnish compensation under the Act, regardless of by whom or under what tort or workmen's compensation statute any other action is brought. The United States, the Act declares, cannot be held liable under any other statute either to the employee or to "anyone otherwise entitled to recover damages * * * on account of" the injury or death of the employee. Petitioner brought this action under the Public Vessels Act, 46 U.S.C. 781, *et seq.*, a "Federal tort liability statute", seeking to impose upon the United States a liability "with respect to the injury or death of an employee" of the United States and "to recover damages from the United States * * * on account of such injury * * *". By the statutory terms, therefore, it is foreclosed.

That the all-inclusive language of Section 7(b) was carefully chosen by Congress is confirmed by an examination of the successive bills which resulted in the addition to the statute (in 1949) of the "exclusive liability" provisions of the Act. The bill which was first drafted and passed by the House of Representatives spoke in terms of a limitation upon the *remedies* of one complaining of his own injury or of the death of another (95 Cong. Rec. 8759):

> (b) The remedy afforded to any person under this action with respect to his own injury

> or the death of another individual shall * * * be the exclusive remedy against, and be in place of any other legal liability of, the United States * * * on account of such injury or death * * *.

This language was perhaps susceptible of a limiting interpretation, such as petitioner suggests in its brief (pp. 7-8), in terms of particular types of claims (*e.g.*, claims by or in the place of the injured party). However, the reference to remedies was excised by the Senate Committee on Labor and Public Welfare, which shifted the emphasis of the bill from the rights of claimants to the immunity of the federal government. It was the Senate version, specifying that the statutory liability of the United States is "exclusive, and in place, of all other liability * * *", which was finally enacted as law. In these circumstances, there is certainly no escape from the conclusion that the words of the statute are to be given their normal scope and application. See, *Underwood* v. *United States*, 207 F. 2d 862, 864 (C.A. 10), "It is significant * * * that the Congress chose to speak in terms of liability of the government, not in terms of remedies or rights of action, and in doing so, it gave a right of action only to the extent that it saw fit to relax governmental immunity from any liability."

Although, as we shall show *infra*, pp. 25-28, this has been the conclusion of all the courts which have considered and discussed the question, petitioner contends that, however clear and plain the words of the statute may be, they do not express the underlying intent of Congress. In its view, Section 7(b) of the Federal Employees' Compensation Act should not

be read to affect the rights of third parties to contribution under admiralty law but should be confined to situations involving the relations of the United States to its employees and their beneficiaries. Although we do not believe that there is any need to go behind the plain language of the statute, we submit that petitioner's contentions are also without support in the relevant history.

II

NEITHER THE RIGHT TO SUE THIRD PARTIES NOR THE CONSEQUENCES OF SUCH SUITS CAN INFRINGE THE STATUTORY LIMITATION UPON THE LIABILITY OF THE UNITED STATES

Crucial to a correct resolution of the present case in terms of the purposes of the federal compensation act is an understanding of the relationship of its employer-employee provisions to those provisions which deal with the employee's right to sue third parties. We shall show in this section that, under the compensation scheme established by the federal statute, the reciprocal rights and liabilities of the United States and its employees are not to be infringed as a result of the employee's retention of a right to sue third parties.

The history and wording of the statute show: (1) that the relationship of the United States to its employees involves a bargained-for compromise of the rights and liabilities of each; and (2) that the provisions allowing and regulating suits against third parties are merely incidental to the statutory compensation scheme and were never intended to permit inter-

ference with the hard-fought compromise at the heart of the statute.

We reserve for the next section of our argument consideration of the exact nature of the consequences of a federal employee's suit against a third party when the federal government and the third party have both been at fault with respect to the injury. At this point, we emphasize only that the rights and liabilities arising out of such third-party practice must necessarily be shaped to avoid a conflict with the fundamental purposes of the Federal Employees' Compensation Act.

A. THE LEGISLATIVE HISTORY

1. *The two primary purposes of the Federal Employees' Compensation Act*

In 1916, Congress passed the Federal Employees' Compensation Act which, as amended, is now found at 5 U.S.C. 751, *et seq.* The main objectives were two-fold. The first and most important was to grant to federal employees a swift, economical and assured right of compensation for injuries arising out of the employment relationship, regardless of the negligence of the employee or his fellow servants or the lack of fault on the part of the United States. The legislative history testifies overwhelmingly to the existence and force of this purpose, and its importance has never been in dispute.

Congress' second purpose, like the first, followed the lead of a number of earlier State compensation statutes. The employer was not to be left without a *quid pro quo* for his surrender of the galaxy of

defenses to tort liability with which he had been surrounded at common law. As stated by Mr. Justice Brandeis in *Bradford Electric Co. v. Clapper,* 286 U.S. 145, 159, the purpose of workmen's compensation laws is to provide "not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." In exchange for its assumption of a liability regardless of its own or the employee's fault, the United States reserved a limitation as to the types and amounts of damages recoverable in cases of employment-connected injuries.

This reservation was indeed of some importance in convincing reluctant Congressmen to agree to a waiver of the defense of employee fault. As the legislative history shows, the government's limitation of liability was in fact, as well as in theory, the consideration which the proponents of the compensation measure offered its opponents in exchange for the absolute liability of the United States. Senator Smith of Georgia introduced an amendment which would have reduced the compensation which a federal employee would be entitled to recover in situations "where the negligence of the employee contributes in whole or in part to the cause of the injury * * *". 53 Cong. Rec. 12888. Arguing against such an amendment, Senator Hughes referred to the "infinitely" greater sums an employee would receive from a jury and explained: "This is * * * a compensation proposition in which the employee waives a great deal of what he might expect to receive, and in which the Government waives a great deal that it

might demand even if it were a private employer, and they compromise their differences * * *". 53 Cong. Rec. at 12889. Senator Cummins opposed any consideration of the employee's fault for an identical reason (53 Cong. Rec. 12894):

> * * * If the Government of the United States was suable, and I will assume for the moment that it is, because in fairness it ought to be, we are substituting for the liability of an employer to an employee a compensation which is so much less than the rule of liability would afford or give the employee that in justice we must give the employee some advantage that he would not have under the rigorous rule of the common law.

This second purpose was no less prominent, thirty-three years later, when the statute was amended to liberalize the benefit provisions and to add the exclusive-liability features of section 7(b). The Senate Report explained (S. Rep. 836, 81st Cong., 1st Sess., p. 23):

> Section 201: Section 7 of the act would be amended by designating the present language as subsection "(a)" and by adding a new subsection "(b)." The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time needless and expensive

litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.

2. *Actions against third parties*

Having provided for the prompt and certain compensation of injured employees and for the limited liability of the United States, the Sixty-fourth Congress had all but covered the fields of its interest in the Federal Employees' Compensation Act. Of far less importance and only briefly discussed were two remaining questions: (1) Whether the right to sue negligent third parties remained; and (2) whether the United States or the federal employee was to enjoy the proceeds of such suits. The first question appears to have been answered without any difficulty. There was no reason why a third party who would otherwise be liable to a federal employee should be relieved of liability by a compensation scheme to which he had contributed nothing.

The second question—how the proceeds of such suits would be distributed—required at least somewhat more attention. There were objections to the proposed provisions (now found in 5 U.S.C. 776–777) which required an employee to reimburse the United States, out of any tort recovery against third parties, for compensation payments made or to be made. During the hearings on an early draft of the bill (H.R. 15222), one Congressman urged that the employee be left "untrammeled", saying further (Hearings before

the House Committee on the Judiciary, 63d Cong., 2d Sess., on Federal Employees' Compensation, Serial 16, Part 2, p. 63):

> Let the Government compensate him, and if he has any remedy against anybody else let him pursue it to the limit.

A draftsman of the bill responded (*ibid.*):

> We felt, as in a great many other cases, that the compensation granted here was going to cost the Government a lot of money. The man is receiving far in excess of anything that he now can get. He is receiving compensation where the United States has been guilty of no fault at all. He is receiving compensation even where he himself may have been guilty of contributory negligence; and therefore in a case like this it would seem only fair to limit him, so far as the Government is concerned, to the amount of compensation granted by the act, and if he can get a large verdict from a railroad or some other corporation he can pocket the difference. * * *

As passed, the Act corresponded to the proposed bill and provided that the United States should recover any compensation payments made or payable before the employee could enjoy the benefits of a tort action against a negligent third party.[2] To assure the federal government the enjoyment of this right, the United States was authorized to require the federal employee, as a condition of receiving compensation payments, to assign it any available claim against a third party.[3]

[2] 5 U.S.C. 777, reprinted in the Appendix, p. 38.

[3] 5 U.S.C. 776, reprinted in the Appendix, p. 37.

B. THE RELATIONSHIP OF THE PRIMARY PURPOSES OF THE ACT TO THE RIGHT TO SUE THIRD PARTIES

There can be no question as to the relative importance of the two primary purposes of the Act and of the provisions involving the right to sue negligent third parties. Congress' concern was largely exhausted when it had defined the rights and liabilities between the United States and its injured employees. Workmen's compensation, the Congressmen repeatedly emphasized, is to be viewed as a cost of doing business to be borne by the business. It has nothing to do with the fault or negligence of the employer or employee, let alone with the fault of third parties. The right to sue third parties was retained not as an integral and significant part of the statutory scheme but simply because there was no reason to allow a third party to benefit from the Compensation Act, to which he was a stranger, at the expense of either the United States or its employee.

These facts alone tend strongly to indicate that the consequences of a federal employee's right to sue a third party cannot be allowed to interfere with the primary purposes of the compensation statute. If in particular circumstances exercise of the employee's right to sue were shown to involve an infringement of the provisions of the Act limiting the liability of the United States, we believe that the right to sue and not the limitation of liability would have to give way. The central and overriding purpose of compensating injured employees was accomplished by granting the statutory compensation. That the desirability of giv-

ing employees benefits beyond those granted by the federal statute was thought less important than the limitation on the liability of the United States is evident, without more, from the fact that Congress denied injured employees the option of suing the United States in tort. See *Dahn* v. *Davis*, 258 U.S. 421. The employee's right to sue third parties to recover amounts in excess of statutory compensation stands on no higher footing if it comes into conflict with the statutory limitation upon the liability of the United States.

Actually, there need be no speculation as to what Congress would have done had it been faced with a conflict between allowing an employee to sue third parties for amounts in excess of his statutory compensation and the purpose of limiting the liability of the United States. Congress in fact considered and resolved an almost identical question. In the reimbursement provisions of the original Act and of all succeeding Acts, Congress has provided that an employee shall not enjoy the benefits of any tort recovery until the United States has recovered the amount of its statutory liability. It follows, *a fortiori*, that no employee would be allowed to increase his recovery by a tort action if the result would be to impose upon the United States a liability *in excess of* that imposed by the statute.

In contending that the right of a federal employee to sue a third party is necessarily subordinate to the statutory limitation of the liability of the United States, we do not suggest that the consequence need be the curtailment of the employee's rights against

third parties. The respective rights of the United States, its employee, and a negligent third party arising out of a suit against a third party is a subject reserved for the next section of our argument. We have merely sought to establish that, however these third-party relationships are defined, it must be in a way which will not permit the incidental right of an employee to sue third parties to dominate the hard-fought compromise at the heart of the compensation statute. Whether some part of the employee's right to sue a third party or some part of the third party's right to contribution must give way, the United States should not be deprived of its retained consideration for assuming absolute liability to its employees. In sum, the United States cannot be subjected to a greater liability when it and another party are both negligent than when it alone is negligent.

III

A NEGLIGENT THIRD PARTY HAS NO RIGHT OF CONTRIBUTION AGAINST THE UNITED STATES FOR THE PAYMENT OF DAMAGES ARISING FROM AN INJURY COMPENSABLE UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT

We have shown in the last section that the statutory limitation of the liability of the United States cannot be infringed as a direct or indirect consequence of the liability of a negligent third party to a federal employee. This conclusion does not, however, fully dispose of the present case.

In situations such as this where both the United States and a third party have been negligent to a federal employee and where there is concededly a

case-law rule of contribution, there are three possible reconciliations of the relationships of the three parties which would not infringe the fundamental purposes of the federal compensation statute. (1) the federal employee's right of action against the negligent third party could be denied or limited. (2) The United States could be required to make contribution but not in excess of its statutory liability. (3) The negligent third party could be required to bear the entire burden of the damages resulting from the injury.

1. The first of these alternatives has not been adopted by any court and can be quickly disposed of. The choice has always been clear between the equitable claim of a negligent third party that it should not be made to pay more than half the damages jointly caused by it and another tortfeasor and the claim of an innocent injured party that he should receive full compensation. In *The Atlas,* 93 U.S. 302, and the *The Juniata,* 93 U.S. 337, the Court held that an innocent victim could recover full damages from either of the two vessels through whose mutual fault the injury had been caused. The risks and burdens of obtaining contribution were placed upon the wrongdoer who was sued. The Court has never departed from this principle.

2. The second alternative is to hold the United States liable for contribution, but only in an amount not in excess of its statutory liability. The Third Circuit at one time adopted this alternative in construing provisions of the Longshoremen's and Harbor Workers' Compensation Act which are almost

identical to those in the Federal Employees' Compensation Act.[4] *Baccile* v. *Halcyon Lines*, 187 F. 2d 403, reversed on another ground, 342 U.S. 282. If the considerations which favored adoption of an alternative that at once maintained the statutory limitation of the employer's liability and allowed some sharing of a jointly-caused liability seem apparent,[5] the two reasons which caused its later repudiation by the Third Circuit (see *infra*, pp. 27–30) are nonetheless compelling.

First, and of crucial importance, there is no statutory authority for such a compromise measure under either the Federal Employees' Compensation Act or the Longshoremen's and Harbor Workers' Act. Each provides unequivocally that the liability of the em-

---

[4] 33 U.S.C. 905 provides:

"§ 905. *Exclusiveness of liability.*

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *."

See also 33 U.S.C. 933 dealing with the employee's right of action against third persons.

[5] It is worth noting that the division of liability under the Third Circuit's *Halcyon* scheme is by no means perfect. Since the government's obligation continues as long as the disability persists, it can and does happen that the federal government's obligation to make periodic payments under the compensation statute ultimately exceeds the damage liability imposed on the third party wrongdoer. In this event the United States, which is alone liable for all sums in excess of the damages recovered by the employee, would bear more than one-half the cost of the injury to the employee.

ployer under specified sections of each statute which set out the compensation scheme shall be exclusive and in place of all other liability. A liability for contribution to the payment of damages is *not* a liability arising under the compensation statute and does not become one simply because the amount of damages recoverable by a third party is limited to the amount of compensation that an employee covered by the statute could recover. Therefore a liability for contribution, even so limited, is forbidden by the "exclusive liability" provisions to precisely the same extent as is any other liability against the employer which is not based upon the Act.

Second, as this Court plainly held in *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 412, any denial to an employer of the right to reimbursement of the amount of his compensation liability out of the recovery from a negligent third party is in conflict with the reimbursement and subrogation provisions of a statute such as the Longshoremen's Act (in *Pope & Talbot*) or the Federal Employees' Compensation Act (in this case), both of which permit this recoupment of compensation payments without regard to the employer's fault. See Appendix, pp. 37–38; see, also, *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.,* 350 U.S. 124, 146 (dissenting opinion of Justice Black). In *Pope & Talbot* a third-party had impleaded the negligent employer, Haenn, and contended that the employee's judgment against it should be reduced by the amount of compensation which the employer had paid to the injured employee. It was argued that if the employee kept such money, he would have a prohibited double recovery; and that if the

money were reimbursed to the employer it would reward an employer whose negligence contributed to the injury. This Court disposed of the contention, saying (346 U.S. at 412):

> A weakness in this ingenious argument is that § 33 of the Act has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries. Pope & Talbot's contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. * * *

For these reasons, we submit, the alternative adopted by the Third Circuit in *Baccile* v. *Halcyon Lines*, 187 F. 2d 403, is unacceptable.[6]

3. Only the third alternative mentioned above—that the negligent third party be required to bear the entire burden of the damages resulting from the injury to a federal employee—is consistent with the fundamental purposes of the Federal Employees' Com-

[6] It is also worth noting that a simple damage remedy could not, in general, be used to require contribution from the United States in an amount not in excess of its statutory liability under the Federal Employees' Compensation Act. The United States is obligated under the Act to make compensation payments over a period of time in amounts which vary with various contingencies relative to the health and employment of the injured employee. To accomplish the result contemplated by the Third Circuit a court would have to order the United States to make these payments, if and when they would have become due to a federal employee, but to make the payments to the third party rather than to the federal employee. It is by no means clear that a court of admiralty should enter such a decree. See *The Eclipse*, 135 U.S. 599, 608; *Sound Marine & Machine Corp.* v. *Westchester County*, 100 F. 2d 360 (C.A. 2), certiorari denied, 306 U.S. 642; Gilmore and Black, *The Law of Admiralty*, § 1-14.

pensation Act, this Court's prior decisions, and the language of the statute, including its subrogation provisions.

If it be said that this alternative defeats the general rule of divided damages in admiralty in one narrowly limited group of cases, the answer is that this is no more than the general consequence of any statutory amendment to a body of case law. Moreover, no unusual liability is imposed upon one in the position of the petitioner in a case such as this. As we have noted above, it has long been settled that either one of two vessels both of which were at fault can be sued by an innocent victim for the entire amount of his damages. *The Atlas,* 93 U.S. 302; *The Juniata,* 93 U.S. 337. The party that is sued is always remitted for his right of contribution to the risks and burdens of a separate action against the other vessel. The Federal Employees' Compensation Act simply cuts off the essentially equitable right of one of two parties at fault to share the consequences of their fault. It returns the petitioner to the situation at common law, overruling in only one restricted situation the rule of contribution which the Court held in *The Catharine,* 17 How. 169, 177, to be in general "the most just and equitable".[7]

[7] Indeed there is room to question whether, even without the "exclusive liability" provisions of the federal compensation statute, the rule of divided damages would be appropriate in a situation where one party remains liable for the payment of amounts in respect of the injury above and beyond the damages sought to be divided. Here, the United States is not released from its liability to its employee by the petitioner's payment of damages. If the statutory compensation scheme results in the employee's having a right to payments beyond

IV

THE RELEVANT DECISIONS UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT AND THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT SUPPORT THE IMMUNITY OF THE UNITED STATES FROM LIABILITY TO THIRD PARTIES ON ACCOUNT OF ITS NEGLIGENCE IN INJURING A FEDERAL EMPLOYEE

Five courts of appeals have construed the "exclusive liability" provision of the Federal Employees' Compensation Act (5 U.S.C. 757(b)) or the almost identically worded provision of the Longshoremen's and Harbor Workers' Act (33 U.S.C. 905) as applied to a suit by a third party who does not claim to stand in the position of the injured employee.[8] Each of these circuits holds that the third party's suit is barred by the plain meaning and clear purposes of these statutes. We know of no appellate decision to the contrary, and petitioner has referred this Court to none.

A. CASES UNDER SECTION 7(b) OF THE FEDERAL EMPLOYEES' COMPENSATION ACT

The decisions of the lower federal courts construing Section 7(b) as applied to noncontractual suits by third persons arising from injuries to federal em-

---

the amount received from the third party, the United States alone must bear this expense. There is little equity in requiring the United States to pay half the sums which are necessary to release the petitioner from liability and yet remain liable itself; and, absent such equity, there is no basis for contribution.

[8] See, *Smither and Co., Inc.* v. *Coles*, 242 F. 2d 220 (C.A. D.C.); *Lo Bue* v. *United States*, 188 F. 2d 800 (C.A. 2); *Drake* v. *Treadwell Construction Co.*, 299 F. 2d 789 (C.A. 3); *United States* v. *Weyerhaeuser Steamship Co.*, 294 F. 2d 179 (C.A. 9); *Underwood* v. *United States*, 207 F. 2d 862 (C.A. 10).

ployees have all upheld the immunity of the United States.

At times the courts have simply relied on the plain words of the statute. In *Christie* v. *Powder Power Tool Corp.,* 124 F. Supp. 693 (D. D.C.), the administrator of a deceased federal employee sued a third-party tortfeasor, who sought to implead the United States on the ground that it had breached "an independent right owed to the third-party plantiffs by the United States" and was, therefore, liable for "contribution and indemnity" under the Federal Tort Claims Act. The court first carefully noted (124 F. Supp. at 694):

> The fact that they are not seeking indemnity under contract is * * * made abundantly clear by the language in their brief in which they state that the indemnity sought "is not contractual indemnity but is indemnity for tort—for a breach of an independent right owed to the third-party plaintiffs by the United States."

In dismissing the third-party complaint on the motion of the United States, the court then stated (124 F. Supp. at 694–695; emphasis in original):

> It appears from the exhibits attached to the motion that plaintiff in this case has received the benefits provided by the Federal Employees Compensation Act, 5 U.S.C.A. § 751 et seq. Any other recovery against the United States is precluded by the terms of that Act, reading, so far as material, as follows: "The liability of the United States * * * with respect to the * * * death of an employee shall be exclusive,

> and in place of all other liability of the United States * * * to the employee, his legal representative * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such * * * death, in any * * * proceedings, whether administrative or judicial * * * *under any Federal tort liability statute.*" 5 U.S.C.A. § 757(b).

More recently, in *Drake* v. *Treadwell Construction Co.*, 299 F. 2d 789, 790, pending on petition for a writ of certiorari, No. 65, Oct. Term, 1962, the Third Circuit has held that Section 7(b) of the Act "withdraws whatever consent the Tort Claims Act, considered alone, would give to the imposition of tort liability upon the United States * * * whether the claim is asserted in the interest of the employee or anyone else." Drake, a government employee receiving compensation under the Act, sued Treadwell for its negligence in the manufacture of an expansion tank which exploded and injured him. Treadwell impleaded the United States under the Federal Tort Claims Act for contribution,[9] and also claimed indemnity on the basis of "an implied contract that the Government will indemnify Treadwell" (299 F. 2d at p. 791). The district court held against the United States. The court of appeals, relying explicitly on the language of Section 7(b) of the Compensation Act, reversed the district court's judgment

[9] The United States conceded that, absent the exclusivity provision of Section 7(b) of the Compensation Act, the United States could be held liable for contribution to Treadwell under *United States* v. *Yellow Cab Co.*, 340 U.S. 543.

against the United States on the ground that (299 F. 2d at p. 791):

> Contribution required of a joint tort-feasor toward the satisfaction of a covered government employee's judgment in tort seems as clearly within the language of Section 7(b) as is total direct liability to the injured employee. * * * [10]

A similar reliance on the language of the statute caused the Tenth Circuit to hold that Section 7(b) precludes an action by a spouse for a loss of consortium. *Underwood* v. *United States,* 207 F. 2d 862; see *supra,* p. 10.

The Ninth Circuit has reached the same result, emphasizing not only the language of the statute but also the fundamental concept of:

> * * * a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicated; incident to this both parties realized a saving in the form of reduced hazards and costs of litigation. * * * [*Posegate* v. *United States,* 288 F. 2d 11, 13 (quoting from *Smither & Co., Inc.* v. *Coles,* 242 F. 2d 220 (C.A.D.C.).] [11]

[10] The Court then ruled against the claim for contractual indemnity on the ground that it was not cognizable under the Tucker Act jurisdiction of the district courts but would have to be brought in the Court of Claims.

[11] See also *Thol* v. *United States,* 218 F. 2d 12 (C.A. 9).

B. CASES UNDER SECTION 5 OF THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT

1. *Actions relying upon a noncontractual right*

Section 5 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 905, provides, in pertinent part, that "[t]he liability of an employer [for compensation] * * * shall be exclusive and in place of all other liability of such employer to the employee * * * and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." Again, the overwhelming weight of authority supports the proposition that there may be no recovery of contribution from a negligent employer subject to the Act.

Here, as under Section 7(b) of the Federal Employees Compensation Act, several reasons for denying contribution have been stressed. This Court, as noted above, has emphasized the statute's reimbursement provisions, which are similar to those found in the Federal Employees' Compensation Act. *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 412. Other courts have relied upon the "exclusive liability" provisions and the purpose of preserving the employer's *quid pro quo*—freedom from tort liability—obtained in exchange for incurring an absolute liability to pay compensation. "Were the rule otherwise," the Third Circuit has said:

> the employer could be made to respond indirectly in tort for damages for which he would not be answerable under the Longshoremen's and Harbor Workers' Act. Such a rule would be violative of Section 5 of the Act as well as

> of the spirit of the entire statute whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability. Cf. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 412, 74 S. Ct. 202. [*Brown* v. *American-Hawaiian S.S. Co.,* 211 F. 2d 16, 18.]

The Second Circuit has similarly pointed out that the employer's

> statutory liability to the libellant for compensation under the Longshoremen's Act is "exclusive," 33 U.S.C.A. § 905, and to permit contribution would be to permit the libellant to evade the statutory command by making of the negligent third party a "conduit" for the recovery of damages from his employer in excess of the statutory compensation. [*Lo Bue* v. *United States,* 188 F. 2d 800, 802.][12]

And the District of Columbia Circuit, sitting *en banc*, has reached a similar conclusion, overruling its earlier decision in *Hitaffer* v. *Argonne Co.,* 183 F. 2d 811, and denying a third party's claim for loss of consortium, in an extended opinion carefully reviewing both the language and purposes of the "exclusive liability" provisions of the Longshoremen's Act. *Smither and Co., Inc.* v. *Coles,* 242 F. 2d 220.[13]

---

[12] See, also, *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F. 2d 322, 324 (C.A. 2): "To impose a noncontractual duty of contribution on the employer is *pro tanto* to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited, liability to secure compensation to his employees."

[13] The cases from State courts involving contribution among joint tortfeasors are in substantial accord. See 2 Larson, *The Law of Workmen's Compensation*, Section 76.21:

"The great majority of jurisdictions have held that the employer whose concurring negligence contributed to the em-

2. *Actions relying upon a contractual right of indemnity*

The cases upon which petitioner places its principal reliance are not in point. Petitioner reluctantly acknowledges that the Court "emphasized" in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, and *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, "that the third party was granted recovery against the negligent employer because the two were in a contractual relationship." Brief, page 16. Petitioner also concedes that "The facts of the instant action present no contractual relationship between the private shipowner and the government." *Id.* at 17. Petitioner's reliance on these cases is, baldly stated, premised on the proposition that the distinction they carefully preserve between a contractual right of indemnity and a noncontractual right of contribution or indemnity founded upon a tort is misleading verbiage used for the twofold purpose of (1) obscuring the decision of issues of statutory immunity under the Longshoremen's Act and (2) overruling without discussion this Court's limitation of the doctrine of contribution in *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282.

Petitioner's reliance on these cases falls with the premise on which it is based. This Court meant what it said in *Ryan* when it stated (350 U.S. at 133):

---

ployee's injury cannot be sued or joined by the third party as a joint tortfeasor, whether under contribution statutes or at common law."

> Because [the ship] * * * relies entirely upon [the employer's] contractual obligation, we do not meet the question of a non-contractual right of indemnity or of the relation of the Compensation Act to such a right.[14]

The terms of the Court's remand in *Weyerhaeuser* make equally clear the limitation of the Court's decision to contractual indemnity (355 U.S. at 569):

> In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of "active" or "passive" as well as "primary" or "secondary" negligence is inappropriate.

Finally, there is nothing in the Court's later decisions to indicate that its reliance upon a theory of contractual indemnity is without significance.[15]

C. THE HARTER ACT CASES DO NOT JUSTIFY PETITIONER'S CLAIM FOR CONTRIBUTION

Petitioner also relies (Brief, pp. 22–23) upon *The Chattahoochee*, 173 U.S. 540, insisting that it demonstrates that the divided-damages rule in admiralty has

---

[14] See also *id.* at 132, note 6: "We do not reach the issue of the exclusionary effect of the Compensation Act upon a right of action of a shipowner under comparable circumstances without reliance upon an indemnity or service agreement of a stevedoring contractor."

[15] The two later cases applying the *Ryan* doctrine, *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, and *Waterman Steamship Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, merely confirmed the contractual basis on which *Ryan* depends. In *Crumady* the doctrine was extended to benefit the shipowner as a third-party beneficiary, the contract containing the steve-

a "special nature" which gives it precedence over the exclusivity provision of the Compensation Act. In that case, notwithstanding the Harter Act, 27 Stat. 445, 46 U.S.C. 190, *et seq.*, which precludes a recovery by the cargo against the carrying vessel for damage to the cargo, a non-carrying vessel which had been involved in a mutual-fault collision with the carrying vessel and had been held liable to the cargo for damage thereto was allowed contribution, with respect to the cargo damage, from the carrying vessel.

We submit that this decision rests upon considerations limited to the Harter Act. Both the language and the legislative history of that Act, which deals only with liability for cargo, are markedly different from the language and history of the Federal Employees' Compensation Act. To begin with, the language of the former is far less compelling. It does not provide that the statutory liability shall be "exclusive," nor does it command that this liability shall be "in place of *all* other liability" (emphasis added). The Harter Act contains no reimbursement provisions like those found in the Federal Employees' Compensation Act, which show clearly that the statutory limitation of liability cannot be affected by the innocent party's right to sue third parties. Most important of

---

dore's warranty of workmanlike service having been entered into between the stevedore company and the charterer of the vessel, instead of its owner. In *Waterman* the doctrine was held to benefit the shipowner when a cargo consignee, and not the shipowner, had contracted for the stevedore services. Each of these cases results in recovery only because of the stevedore's breach of his "warranty of workmanlike service," an exclusively contractual basis for indemnification.

all, both the language of other sections of the Harter Act (46 U.S.C. 190–191) and its legislative history (see *The Delaware*, 161 U.S. 459, 471–474; *United States* v. *Atlantic Mutual Insurance Co.*, 343 U.S. 236) show unequivocally that the Harter Act was intended to deal with one limited facet of the problem of a carrier's liability to its cargo—the problem of contractual waivers of liability between a carrier and its cargo—and was not intended to work a pervasive change in the entire structure of liability and compensation for losses. There can be no doubt that the Federal Employees' Compensation Act was, in contrast, intended to work such a pervasive change in the structure of liability for employee injuries, substituting compensation as a cost of doing business for the prior concepts of liability for fault alone and effecting such changes in the body of prior case law as were necessary to protect the balance established by this newly created system of compensation.

In light of the totally dissimilar purposes of the two statutes and the differences in language and reimbursement provisions, it is not surprising that the lower courts have found that the liability-limiting provisions of the two statutes have different scopes. There are many justifications for such a distinction, but the considerations at the root of it have nowhere been more succinctly stated than in Judge Learned Hand's concurring opinion in *American Mutual Liability Ins. Co.* v. *Matthews*, *supra*, a decision which denied contribution on the strength of the immunity provisions of the Longshoremen's Act. Judge Hand pointed out that prior to the enactment

of the Harter Act the shipowner could not contract away his liability for negligence, but could, by contract, relieve himself from the duty to furnish a seaworthy ship. The Harter Act relieved him from liability for negligence where he used due diligence to man and equip the ship, and only required in return that he give up his privilege to contract away his duty to furnish a seaworthy ship. The Harter Act was a balance of advantage and disadvantage, but it was a balance under which the carrying ship actually obtained more than it surrendered upon passage of the Act (182 F. 2d at 326):

> Thus, the effect of the doctrine of The Chattahoochee, supra, was that the sum of these changes in the owner's duties was not enough to justify extending the release beyond direct claims of shippers. Whether, as *res integra,* that was right, is not important here; what is important is that the balance between the changes made there as a condition of the release, was very different from a similar balance in the case at bar. It is for these reasons that I do not think the Chattahoochee, supra, a precedent.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

ARCHIBALD COX
Solicitor General.

JOSEPH D. GUILFOYLE
Acting Assistant Attorney General.

JOHN G. LAUGHLIN, Jr.,
ANTHONY L. MONDELLO,
STANLEY M. KOLBER,
Attorneys.

OCTOBER, 1962.

APPENDIX

The reimbursement and subrogation provisions of the Federal Employees' Compensation Act, Sections 26 and 27, 39 Stat. 747, 5 U.S.C. 776–777, as set forth in the United States Code, provide:

> § 776. *Subrogation of United States to employee's right of action; assignment by employee; disposition of money collected from person liable.*
>
> If an injury or death for which compensation is payable under sections 751–756, 757–781, 783–791 and 793 of this title is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Secretary may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the Secretary may require said beneficiary to prosecute said action in his own name.
>
> If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the Secretary, he shall not be entitled to any compensation under sections 751–756, 757–781, 783–791 and 793 of this title.
>
> The cause of action when assigned to the United States may be prosecuted or compromised by the Secretary, and if the Secretary realizes upon such cause of action, he shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expense of such reali-

zation or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury.

§ 777. *Adjustment in case of receipt by employee of money or property in satisfaction of liability of third person.*

If an injury or death for which compensation is payable under sections 751–756, 757–781, 783–791 and 793 of this title is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury of death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States, on account of the same injury.

U S GOVERNMENT PRINTING OFFICE 1962